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Nos. 80-1798, 80-1808, 81-91

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WOELKE & ROMERO FRAMING, INC.,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD; CARPENTERS LOCAL NO. 944, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; AND CARPENTERS LOCAL NO. 235, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,
Respondents.

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION OF GEORGIA POWER COMPANY FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENTS AND BRIEF AMICUS CURIAE OF GEORGIA POWER COMPANY IN SUPPORT OF RESPONDENTS

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MOTION OF GEORGIA POWER COMPANY FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENTS

Georgia Power Company hereby respectfully moves for leave to file the attached brief amicus curiae in support of the Respondents in these three consolidated cases. The consent of the attorneys for the Respondents, the National Labor Relations Board; Carpenters Local No. 944, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; and Carpenters Local No. 235, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, has been obtained. The consent of the attorney for the Petitioner in No. 80-1808, Pacific Northwest Chapter of the Associated Builders & Contractors, Inc., has been obtained. The consent of the attorneys for the Petitioners in Nos. 80-1798 and 81-91, Woelke & Romero Framing, Inc. and Oregon-Columbia Chapter, the Associated General Contractors of America, Inc., was requested but has been refused.

The interest of Georgia Power Company in these consolidated cases results from its status as the defendant in an action currently pending in the United States District Court for the Southern District of Georgia in which the plaintiff has alleged that Georgia Power Company violated the federal antitrust laws by conspiring with local construction trade unions in the Augusta, Georgia area to exclude non-union contractors from working on the construction of a generating plant being built by Georgia Power Company near Augusta, Georgia. One of the defenses raised by Georgia Power Company to that action is that the agreement, if any exists, between it and the construction trade unions to exclude non-union contractors from the generating plant construction project is lawful under the "construction industry proviso" to Section 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e), and therefore exempt from the application of the antitrust laws. To the extent that the Court's decision in these cases determines the scope of the construction industry proviso and delineates the policies underlying its enactment by Congress, it will impact upon the defenses raised by Georgia Power Com-

pany in the action pending against it in the Southern District of Georgia.

In the cases before the Court, the Petitioners are a contractor and two associations of contractors. Their interests and the interests of the Respondents differ markedly from those of Georgia Power Company, which not only acts as a general contractor in the construction of multi-billion dollar electric generating facilities, but also is a purchaser of hundreds of millions of dollars of construction services annually in the form of electric generating facilities, office buildings, and other commercial facilities. As both a general contractor and a purchaser of construction services, Georgia Power Company has a great interest in obtaining construction services at the most economical cost and in promoting construction trade unions, which provide a source of the large number of skilled craftsmen necessary to complete construction of an extremely large construction project such as an electric generating facility. Thus Georgia Power Company can provide the Court with a different viewpoint of the issues presented by these appeals from that of either the Petitioners or the Respondents.

Respectfully submitted,

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICUS CURIAE OF GEORGIA POWER COMPANY IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

Georgia Power Company is an electric utility company that provides electricity to approximately one million two hundred thousand customers throughout the State of Georgia. Georgia Power's interest in these cases before the Court on writ of certiorari results from its status as a purchaser of construction services and as the owner of and general contractor for two electric generating plants under construction in Georgia, each of which has an estimated cost of approximately five billion dollars. Also, Georgia Power Company is the defendant in an action pending in the United States District Court for the Southern District of Georgia in which the scope of the construction industry proviso to Section 8(e) of the National Labor Relations Act, 29 U.S.C.A. § 158(e), will be an issue.

Georgia Power Company is undoubtedly one of the largest non-governmental purchasers of construction services in the State of Georgia. During 1981 Georgia Power budgeted over six hundred and fifty million dollars ($650,000,000.00) to be spent on the construction of new generating facilities. The two largest projects that Georgia Power currently has under construction are Plant Scherer, a fossil-fuel powered electric generating plant being constructed in Monroe County, Georgia, and Plant Vogtle, a nuclear-powered generating plant being built in Burke County, Georgia. The estimated cost of each of these two generating facilities is approximately five billion dollars ($5,000,000,000.00).

With regard to each of these two construction projects Georgia Power Company will be a partial owner of the completed generating plant and is acting as the general contractor on each project. Its construction department determines how the work to be performed on each project is divided up, develops and implements schedules for the completion of the work, evaluates and selects contractors to perform the various jobs on each project, and provides

management coordination at the job site. With regard to Plant Vogtle alone, Georgia Power Company has contracted with approximately fifty contractors to complete construction of various buildings or other portions of the Plant Vogtle project. Georgia Power monitors and inspects the work performed by the contractors and subcontractors employed by it, purchases materials and equipment to be used by the contractors and subcontractors, assists in training skilled craftsmen, coordinates labor relations between the construction project and local unions, monitors workers' productivity, and implements safety programs. To carry out the numerous functions performed by Georgia Power Company in building generating facilities, the construction department currently employs over 1,100 persons, almost all of whom are located at the two generating plant construction sites.

Both Plant Vogtle and Plant Scherer are being constructed using union workers pursuant to "project agreements" negotiated by Georgia Power Company with the local trade unions. Georgia Power negotiated a separate agreement with different local unions with respect to each plant although the terms of the two agreements are similar. Both project agreements require that all workers employed by Georgia Power, its contractors, and their subcontractors be obtained by referral from the hiring halls maintained by the local construction trade unions and provide that wages and fringe benefits for such workers be determined by the collective bargaining agreements entered into by the local unions and the area contractors' associations with certain limitations. Each of the two project agreements applies only to the construction of a single generating plant. Although the project agreements do not require the exclusion of non-union contractors, Georgia Power has unilaterally determined that it will not award work on the projects to any contractor who cannot show that he has reached an agreement with the local trade unions having

jurisdiction over the particular project to refer workers to him.

In February of 1981, Georgia Power Company was named as the defendant in an action filed in the United States District Court for the Southern District of Georgia by a non-union contractor who had submitted a bid for the construction of the administration building at Plant Vogtle and had not been awarded the contract. The contractor alleged that Georgia Power Company had violated Section 1 of the Sherman Act, 15 U.S.C.A. § 1, by entering into a conspiracy and agreement with the Augusta Building and Trades Council to exclude non-union contractors from the Plant Vogtle project.

One of the defenses raised by Georgia Power Company to that action is that an agreement, if any exists, between it and the Augusta Building and Trades Council to exclude non-union contractors from Plant Vogtle is lawful under the construction industry proviso to Section 8(e) of the National Labor Relations Act, 29 U.S.C.A. § 158(e), and is therefore exempt from the application of the federal antitrust laws. To the extent that this Court in resolving these cases determines the scope of the construction industry proviso and delineates the policies underlying its enactment, that determination will affect the ability of Georgia Power to defend against the antitrust action currently pending against it in the Southern District of Georgia.

Georgia Power believes that by entering into the project agreements with respect to Plant Vogtle and Plant Scherer with the construction trades local unions having jurisdiction over each plant site, it has achieved a substantial cost savings in the construction of those two generating plants and has secured a source of the large number of skilled workers required to complete each project. This Court's determination of the scope of the construction industry proviso to Section 8(e) could potentially affect the legality and usefulness of those project agreements in light of the pending antitrust action against Georgia Power Company.

For these reasons, Georgia Power Company is filing this brief amicus curiae in support of the interpretation of Section 8(e) advocated by the Respondents in these cases. This brief amicus curiae is filed with the consent of all of the Respondents and of the Pacific Northwest Chapter of the Associated Builders & Contractors, Inc., Petitioner in case number 80-1808. The consent of the Oregon-Columbia Chapter, The Associated General Contractors of America, Inc. and of Woelke & Romero Framing, Inc., Petitioners in cases 81-91 and 80-1798, has been requested but was refused.

SUMMARY OF ARGUMENT

The restrictive subcontracting agreements at issue in these cases fall within the literal language of the construction industry proviso to Section 8(e) and also facilitate the purposes for which Congress enacted the construction industry proviso and the other sections of the 1959 Landrum-Griffin Act that facilitate the organizational efforts of unions in the construction industry. Therefore the interpretation of Section 8(e) adopted by the National Labor Relations Board should be affirmed by this Court and the order of the Board enforced.

ARGUMENT

The only issue presented by these three cases that Georgia Power intends to address in this brief amicus curiae is the scope of the construction industry proviso to Section 8(e) of the National Labor Relations Act, 29 U.S.C.A. § 158(e). The Petitioners contend that the proviso does not encompass agreements that restrict subcontracting to unionized subcontractors, even if the agreement is made in the context of a collective bargaining relationship, where the agreement is not limited to a particular job site on which workers represented by the union that signed the agreement will be employed at some point or where the subcontracting clause requires that subcontractors be signatories to an agreement with a specific union. The National Labor Relations Board found the restrictive subcontracting clauses at issue to be valid under the construction industry proviso to Section 8(e), because they were entered into by parties in a collective bargaining relationship. Georgia Power Company supports the interpretation of Section 8(e) advocated by the National Labor Relations Board.

I. The Ninth Circuit's Determination That the Subcontracting Clauses Being Challenged by the Petitioners are Lawful Under the Construction Industry Proviso of Section 8(e) Should Be Affirmed.

Georgia Power Company believes that the en banc court of the Ninth Circuit correctly determined in *Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. v. NLRB*, 654 F.2d 1301, *cert. granted*, —— U.S. —— (1981), that subcontracting agreements that are not limited to a single job site, that apply regardless of whether the contractor employed union members on the job, and that require the subcontractor to have a bargaining agreement with a particular union are within the scope of the protection accorded to restrictive subcontracting agreements between a union and an employer in the construction industry by the first

proviso to Section 8(e) of the National Labor Relations Act. The opinion of the Ninth Circuit and the decision of the District of Columbia Circuit in *Donald Schriver, Inc. v. N.L.R.B.*, 635 F.2d 859 (D.C. Cir. 1980), *cert. denied*, 101 S.Ct. 2058 (1981), which enforced the Board's decision in a companion case to the ones before this Court, present the legal reasoning supporting the decision reached by the Ninth Circuit in a much more capable and detailed manner than can Georgia Power Company within the limitations of a brief amicus curiae. Georgia Power Company does wish, however, to focus briefly upon some of the policy considerations that support the decisions reached by the National Labor Relations Board and the en banc court of the Ninth Circuit.

The patterns of employment characteristic of the construction industry differ markedly from those of other industries. Generally construction projects are of limited duration and a variety of contractors and subcontractors, each with his own set of employees, will perform work at different stages during the course of a single project. Workers in the construction industry typically are not continuously employed by the same employer but work for many employers on successive jobs of short duration. With the exception of general laborers, workers in the construction industry are generally skilled craftsmen who perform only one particular type of construction work, such as carpentry or pipe fitting. Particularly on commercial construction projects, the skills of any one type of craftsman will be required only during one stage of the construction.

The typical pattern of employment in the construction industry and the resulting difficulties encountered by unions in attempting to organize workers in that industry for purposes of collective bargaining motivated in part the enactment by Congress in 1959 of the construction industry proviso to Section 8(e) and also of Section 8(f), which allows employers in the construc-

tion industry and unions representing workers employed in the construction industry to enter into agreements concerning terms and conditions of employment prior to the employees of that employer designating the union as their collective bargaining representative.

In addition to the difficulties encountered by unions in organizing workers, the pattern of employment in the construction industry creates problems for the contractors who must employ construction workers and the owners for whom the construction work is performed. Both the contractor and the owner must be able to make a reasonable estimate of the cost of obtaining labor on a construction project, the contractor so that he can make an accurate bid for the contract to perform the work and the owner so that he can evaluate the economic reasonableness of undertaking the construction project. The contractor must be able to obtain a sufficient number of skilled workers to perform the construction contract within the time constraints imposed by the owner or other contractor with whom he contracts.

Another significant characteristic of employment in the construction industry is that typically several employers will be working in close proximity on the same construction project. As a result, disputes between one employer and a union either representing or seeking to represent his employees can impact upon the entire construction project and the operations of all of the other employers on the project. Thus, a dispute between a subcontractor who is performing only a very minor function in the completion of the project can detrimentally affect the completion of the entire project.

These concerns, discussed here in the abstract, impact directly upon Georgia Power Company and motivated it to enter into the project agreements with the construction trade unions have jurisdiction over the Plant Scherer and Plant Vogtle projects. The project agreements insure that Georgia Power, as an owner of and the general contractor for each project, and its contractors and sub-

contractors, will have a sufficient number of skilled craftsmen available to complete construction of the generating plants in a timely fashion, even though neither project is located near a metropolitan area of any size. The project agreements also enable Georgia Power, both as owner and general contractor, to better estimate the cost of completing each plant by establishing wage rates and fringe benefit payments for the workers employed on the project. Because it was able to negotiate the elimination of certain benefits, such as travel pay and doubletime, normally received by union craftsmen under their local collective bargaining agreements, Georgia Power Company has obtained substantial cost savings in the completion of Plant Vogtle and Plant Scherer.

Restrictive subcontracting agreements of the type at issue in these cases also promote the same policies that prompted the enactment by Congress of the special provisions in the 1959 Landrum-Griffin Act that concern the construction industry. Such agreements benefit not only the unions representing workers employed in the construction industry but also the employers and purchasers of construction services. A subcontracting agreement that requires that any subcontractor with whom the employer contracts, regardless of the job site on which the subcontractor will work and regardless of whether any of the employer's employees represented by the union will be present at that site, serves to promote labor peace on the project and prevent strife resulting from union and non-union workers being present on the same construction site. Thus such subcontracting agreements protect the employers' interests as well as those of the unions.

The desire to prevent disruptions and delays in the completion of Plant Vogtle and Plant Scherer prompted Georgia Power to determine that it would not award contracts for work to any contractor who could not demonstrate that he had reached an agreement with the area

construction trade unions to refer workers to him pursuant to the applicable project agreement. While Georgia Power has not entered into an agreement with the unions to exclude non-union contractors, the practical effect is the same. By excluding non-union contractors, Georgia Power Company can avoid the extremely costly delays that can result when labor strife erupts on a project, even when only a small subcontractor is involved. In the context of the construction of a multi-billion dollar generating plant, even a short delay can be extremely costly both to the owner as a result of its use of the generating plant being delayed and to the contractors in terms of inability to complete work on schedule.

Subcontracting agreements such as those at issue in these cases also facilitate the unionization of the construction industry in a manner that is consistent with the purposes underlying the special provisions of the 1959 Landrum-Griffin Act that apply solely to the construction industry. While one of the goals of that legislation was to prevent "top-down" organizing by unions, another obvious goal was to ease some of the problems preventing collective bargaining by unions, which was one of the purposes of the National Labor Relations Act. By facilitating the organizational efforts of construction unions, such restrictive subcontracting agreements benefit employers in the construction industry by insuring the continuation and expansion of the union apprenticeship and training programs that produce the skilled craftsmen necessary to complete large commercial construction projects.

For these policy reasons, Georgia Power Company contends that restrictive subcontracting agreements such as those at issue in these cases should be protected by the construction industry proviso. Such agreements fall both within the literal language and the spirit of that proviso.

II. Issues Not Presented By These Cases.

The three consolidated cases before this Court on writ of certiorari to the Ninth Circuit all involve subcontracting agreements that were entered into in the context of a collective bargaining relationship. Georgia Power Company respectfully suggests that these cases do not present the Court with any issue concerning what subcontracting agreements between parties not in a collective bargaining relationship are permissible under the construction industry proviso to Section 8(e). Because the parties have not disputed the existence of a collective bargaining relationship in these cases, no issue arises concerning the extent to which a pre-hire agreement under Section 8(f) of the National Labor Relations Act, 29 U.S.C.A. § 158 (f), establishes a collective bargaining relationship between a union and an employer in the construction industry.

CONCLUSION

The particular characteristics of employment in the construction industry that prompted Congress to enact the construction industry proviso to Section 8(e) and to authorize pre-hire agreements under Section 8(f) of the National Labor Relations Act warrant the affirmation and enforcement of the National Labor Relations Board's decision that the clauses at issue in these cases, which were adopted by parties in a collective bargaining relationship, fall with the scope of permissible subcontracting agreements under the construction industry proviso to Section 8(e) of the National Labor Relations Act.

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